

USACE LEGAL SERVICES WORKSHOP the CIVIL WORKS PROGRAM

18-22 May 1998

New York City, NY

Civil Works Workshop Polishes Up the Big Apple

Howard Goldman, Senior Counsel for Civil Works, HQUSACE, kicked off the USACE Legal Services Civil Works Workshop by welcoming the attendees and introducing himself. He discussed the origin of the idea for the conference. There are many project cooperation agreements and decision documents which are produced in connection with our Civil Works projects. The conference was needed to stress early involvement of counsel in production of these documents, as well as to explain the process of production, including review and approval by HQUSACE and the Assistant Secretary of the Army for Civil Works (ASA(CW)). Originally, the conference was planned for an audience of only attorneys in the Office of Counsel chain. Mr. Goldman, however, did not want to restrict this learning tool just to attorneys and so decided to invite project managers, planners, real estate attorneys, and sponsors.

Mr. Goldman explained that he intended for the conference to provide a solid background of the Civil Works program. He wanted to provide the viewpoint and outlook of Headquarters. He encouraged open discussion throughout the conference.

Mr. Goldman then introduced some of the distinguished guests of the conference: Newt Klements, Deputy Chief Counsel; Liz Fagot, Real Estate; senior staff from the headquarters Chief Counsel's Office, including Ron Allen, Martin Cohen, Mike Adams, and Frank Carr; Scott Murphy from the Chief Counsel's Office; Kristin Budzynski from the Baltimore District Office of Counsel and currently on temporary assignment with the Chief Counsel's Office; Stephanie May and Earl Stockdale from the Army General Counsel's Office; and several of our sponsors from across the country. Mr. Goldman extended his thanks to Colonel Thomas and his staff at the New York District for their assistance with the conference.



Howard Goldman, Senior Counsel for Civil Works, HQUSACE, convenes the first ever CW Workshop joining PMs, Planners, and Sponsors with Attorneys in the learning process.

Lester Edelman then welcomed the group. He noted that there were participants from two different activities present: the Civil Works Workshop and the USACE Legal Services Senior Leadership Conference. Pointing out the importance of understanding our past, Mr. Edelman urges everyone to view Ron Allen's videotape on the history of the Civil Works Program. Mr. Edelman then introduced the new occupants of two positions: Morris Tanner, SWD Division Counsel, and Mary Byers, NAE District Counsel. ♦

Monday, May 18th

NAD/NAN Overview and Welcome

MG Jerry Sinn, *Commander, NAD*

COL Gary Thomas, *Commander, NAN*

MG Jerry Sinn addressed the attendees with a few points about New York City, the North Atlantic Division, and the conference. He noted that New York City is a unique place. He made the point that people do not necessarily know who you are if you are a military officer, but people do recognize the Corps of Engineers symbol. The Corps represents dependable service and good quality.

MG Sinn then discussed the changes that have been taking place at NAD. The Division has moved to Fort Hamilton, has acquired a new FUSRAP mission, and has added Europe District to its responsibilities. MG Sinn noted that NAD is dynamic but small. The Division is proud to be able to do big things with small resources. He stressed that he would like to see Civil Works project approvals move more quickly. The conference can assist in that goal, for knowing the process helps improve efficiency. If we can discover ways to move more quickly, we can get more work and more revenue.

COL Gary Thomas, Commander, NAN, then welcomed the attendees to New York City. He noted that several large events were occurring in the New York area this week, including Fleet Week and the SAME national convention.

COL Thomas discussed how NAN is working to improve competitiveness in their shore protection and flood control



MG Jerry Sinn, Commander, NAD, stated that in New York, people do recognize the Corps of Engineers symbol: "The Corps represents dependable service and good quality."

programs. He has 50 recruitment actions taking place and urges those who are looking for a challenge to apply. The District has a healthy Civil Works program, including a \$650 million harbor deepening project and an \$18 million feasibility study for further deepening of New York harbor. The nature of funding has changed, for this fiscal year 50% of NAN's funding is from Congressional add-ons and the Civil Works appropriations doubled from what was in the budget request. The expectations of customers are increasing. Cost-sharing partners are committed to projects and willing to spend money. However, the approvals are still slow. COL Thomas urged the attendees to examine how we can increase the speed of approvals.

COL Thomas stressed innovative thinking in finding solutions to issues with the New York ports. We must be flexible in finding disposal options to address political and environmental dynamics. Disposal of dredge material is becoming a major business. NAN has eighteen applicants with proposals for disposal of material, which are viewed as a resource for beneficial use. We are seeking long-term solutions and looking at new ways of doing business. ♦

AGENDA: Monday, May 18th

- 8:45 - 9:00 Introduction and Welcome
- 9:00 - 9:30 NAD / NAN Overview & Welcome
- 9:30 -10:00 The Future of the Civil Works Program
- 10:00-12:00 Civil Works Planning - Hot Topics
- 1:15 - 1:45 Port Authority of New York and New Jersey
Presentation: New York Harbor Projects
- 1:45 - 2:45 USACE Strategic Planning
- 2:45 - 4:30 Open discussion

Monday, May 18th

The Future of the Civil Works Program

Civil Works - Hot Topics

MG Russell Fuhrman, *Director Civil Works, HQUSACE*

MG Russell Fuhrman, Director of Civil Works, discussed the future of the Civil Works Program and Hot Topics in Civil Works. MG Fuhrman noted that strengths of the Corps include its strong civilian leadership and its multidisciplinary organization and predicted an exciting decade ahead. He mentioned that he spends one hour each week with his SESers and Colonel Burkhardt working the “futures piece,” because he recognizes that it is too easy otherwise to get caught up with daily doings. He discussed the Chief’s scenario group, which predicts the future in the year 2020 and then determines how to structure the work force to hit that mark.

MG Fuhrman indicated that we are a \$12 billion agency in constant dollars. He anticipates that the strong economy will hold for several more years and that the increase in discretionary funds will directly affect Civil Works, with more investment in infrastructure. He believes that powering down will continue and that there will be increase in partnering, contracting out, and “bottom up” project development, where the sponsor has money and needs something done right away so it will upfront money to get the project moving. After discussing the reactive nature of second term presidencies and the lack of a clear majority in the Congress to work its will, MG Fuhrman indicated that a project must stand on merit and that there will be a regional, rather than local, focus on water resources, with decisions on projects driven by economics and decided on where value will be added.

On the military side, MG Fuhrman did not envision any great military threat until at least year 2015 or 2020. He opined that at best the defense budget will remain constant. He noted limited new infrastructure and mentioned the tension in funding for repair and maintenance, modernization of the military, quality of life, training, and deployment. On the Army side, he saw continued strong support of reserve components. He pointed out that we are already dealing with privatization and CVI at 26 installations. He opined that the military construction budget will continue to go down.

In discussing the civil works environment, MG Fuhrman noted that the viability of the national economy depends on infrastructure, especially transportation. He reiterated that infrastructure development will occur where the economy is driving it (rather than a “build and they will come” approach).



MG Russell Fuhrman, Director of Civil Works, HQUSACE, noted that strengths of the Corps include its strong civilian leadership and its multidisciplinary organization.

He opined that deeper depths and bigger locks will continue, because the economy is driving it. He noted that role of waterborne transportation in making our grains competitive.

The Director stated that the hard decision for environmental protection and restoration projects is determining the value added for the money and where to draw the line. He suggested that in the past mitigation was viewed locally but that now a holistic approach should apply and that we should look to see where it makes sense to invest environmental dollars, i.e., where is the best dollar payback for the nation. He also noted that recreation will continue to grow due to the improvement in the economy and the growth in leisure time.

MG Fuhrman portrayed hydropower as a regional issue and noted that we produce 25% of the net hydropower overall but 65% in the Northwest. He commented that other than gas turbines, hydropower is the only on demand energy source.

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Future of CW Program/Hot Topics, *continued*

He opined that the value is more than the percentage produced indicates. He further noted the push to modernize our systems and mentioned the direct funding provided by BPA and his expectation that we will see more of that type of arrangement.

In turning to hot topics, MG provided the following assessments. With the backlog of maintenance and repair increasing and with more projects coming on line, we will need 25% real growth in O&M over the next 5-6 years. This can be achieved half from internal efficiencies but the other half will need to come in budget increases. The challenge in CG is flexibility. For example, last month he moved \$50 million from various projects to projects that need the money now. In the past, there was up to \$1 billion in working funds but Congress has now started earmarking more funds and the Director has lost flexibility to move money around. Also, things will not get better in the regulatory arena. Congress is not excited about the regulatory business and controls with purse strings, i.e., provides a limited budget. However, hydropower is a good news story, a money maker. The challenge will be in the marginal hydropower facilities, which cannot be run from a business perspective and will have to be subsidized. Further, flood control and shore protection will continue as the BCR are there; the issue will be who pays. Finally, Emergency Ops is a growing business and establishes our reputation nationwide. We need to work the public affairs piece so that our value added to the nation is publicized. Readiness 2000 will lead to greater efficiencies. We cannot let our guard down; however, we can feel good because we have our team in place.

MG Fuhrman then answered questions. In response to the question that observed that we are currently in a cycle of lots of water but asked what happens when we enter into a cycle of less water or water in the wrong places, MG Fuhrman noted that the answer is in the Federal Government responding on a more holistic basis and by noting that we are not just dealing with surface water. On FUSRAP, which was characterized as a "hostile takeover," MG Fuhrman noted the limited scope, i.e., \$140 million annually, of the program but stated that we need to do it right and opined that we do environmental cleanup better than anybody else. If we do the FUSRAP job well, he hoped that other agencies will come to us to do this type of work (rather than Congress giving us the work). Answering a question on the Congressional adds for infrastructure work, such as water sewers in Alaska, West Virginia, Pennsylvania, and other remote areas, the Director noted that he wasn't sure where it was going but that it was coming in bits and pieces and that he would prefer for the

Administration and the Congress to come to grips with the issue so that a holistic approach was used so that we could give the customer value added. On the issue of economic justification, he noted that economic drivers do not mean that the haves will get more; rather, the issue is that for this nation to compete, certain harbors and projects must occur and these projects will occur; therefore, the Corps needs to posture itself to do the work. Congress will work the margin pieces, i.e., there will always be Congressional adds. Regarding Federal hydropower development, the Director noted that he didn't see that happening anytime in the next ten years in light of the abundance of other sources of energy now. He also noted that the Administration's position is that TVA will continue its appropriated projects and it has budgeted for those in the out years although there appear to be mixed approaches and views on the Hill regarding TVA. On the issue of technical assistance to contractors, the Director stated that a lot of what we do helps the private sector to compete. He acknowledged that our contractors are out there on their own whereas other countries help their contractors but stated that it is a State Department call and that we will do work for State Department to support American firms in other countries. In response to a question on whether the Administration and the Congress will come to grips as to what the Corps budget and role really ought to be, MG Fuhrman responded that because of the budget surplus and growing economy, there is more opportunity for that to happen in the next three to four years. He commented that the funding issue is not what the budget is but rather what the Federal role is, where Federal dollars should go, who should be the beneficiaries and, who should pay. Responding to a question on what is being done in the way of a national dialogue on use of coastal waters, the Director stated that there was not a lot from a national level. In dealing with ports and the dredging industry, the issue is not who is doing the dredging or the cost; the fundamental issue is where do we put dredged material, and the ports and the dredging industry are not coming to grips with this fundamental issue. On ways to increase efficiency, MG Fuhrman offered decentralizing continuing authorities and making divisions bigger players. On a question regarding the implications on the FY 2000 budget on the Harbor Maintenance Trust Fund if WRDA 1998 does not provide a substitute, he said that the work is driven by budget authority (short term) and that the trust fund is a tax issue. Answering a question on how we are doing in our relationships, the Director discussed the concept of the divisions as business centers and noted that the key to our future is regional views. He noted that districts will always be

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Port Authority of New York and New Jersey: New York Harbor Projects

Thomas Wakeman, *Program Manager of Dredging Division, the Port Authority of NY and NJ*



Tom Wakeman from the Port Authority of NY and NJ suggested 3 ways to prepare for the 21st Century: Maintenance Work, New Construction and Development of a Port Master Plan.

Tom Wakeman discussed the Port Authority, the New York Port, work with the Corps, and partnering. At the outset, he stressed that attorneys are needed to be successful in doing this work.

Mr. Wakeman detailed the history of the Port Authority and the New York Port. The Port Authority is run by a Board of Commissioners and receives its revenue from its business, such as tolls on ferries, tunnels and bridges in its jurisdiction of a twenty-five mile radius around the Statue of Liberty.

The Port has a three hundred year history but must be prepared for changes. Although the Port in the 1950s consisted mainly of finger piers and warehouses, industry changes have made different structures necessary. The trends for the future include an increase in trade, shifting trade patterns, consolidation of carriers, and larger, faster vessels. Growth is projected for the region, bringing with it an increasing number of jobs and sophistication of the industry. Concerns include siting of land facilities, dredging volumes, pollutants, and disposal. Growth in vessel size and drafts increase the need for dredging.

There are three steps to prepare for the 21st century in a very competitive industry. The first is maintenance work, including concerns over sediment contamination and disposal of dredge material. The second step is new construction. Federal appropriations for new construction projects is crucial. The third step is development of a Port Master Plan. The Port needs agreements with landside stakeholders to develop highways and rail to move cargo. Waterways management operations are crucial for business. The Port must also address environmental concerns, a concept that is not mutually exclusive from economic gain. The next step will be to develop a national transportation strategy, as cargo and passengers becomes a competitiveness issue.

During a question and answer session, Mr. Wakeman addressed questions on the wisdom of spending money to create a fully functioning port in New York. ♦

Future of CW Program/Hot Topics, *continued*

there but we need to be able to move our resources around in a way that makes sense. We must determine whether a decision is made because it makes sense from an economic standpoint or from a people standpoint. If the basis is the latter, then the organization will be inefficient and will go down. He noted that the relationship between the district and divisions in Civil Works has never been better and that there are SES team players, who are really trying to work issues with the field. Regarding how the emphasis on regionalism

applies when dealing with NED requirements, the Director acknowledged the need for rules and noted that over time the criteria will change but that we must show consistent application and must consider the effect of a deviation. In responding to a request for advice on how to get a deviation from policy, MG Fuhrman recommended getting the district commander decisively involved and making sure that he or she understands the significance of the deviation being requested. In closing, the Director noted that our strength is the great trained workforce, which must be leveraged to expand our horizons. We must think "out of the box," tighten our belts and make hard choices, but the Director sees a rosy future. ♦

Monday, May 18th

USACE Strategic Planning

Steve Reynolds, *Strategic Management and Innovation Division, Directorate of Resource Management, HQUSACE*

Steve Reynolds gave a presentation on scenario-based strategic planning to the group on Monday afternoon. Newt Klements, Deputy Chief Counsel, HQUSACE, prefaced Mr. Reynolds' presentation by explaining LTG Ballard's Strategic Vision and the implementation measures to put the plan in place. The second step of implementation is scenario-based strategic planning. He explained that Mr. Reynolds is one of the leaders in scenario-based strategic planning.

Mr. Reynolds discussed how to conduct scenario-based strategic planning. There is a group of twenty-five people across the Corps working on this concept. He explained that when LTG Ballard took command of the Corps, he indicated that he had a desire to do a strategic plan. Fortune-500 companies have taken years to create such plans; LTG Ballard wanted the Corps to do it more quickly. Near-term changes, or the close battle, were initiatives-based. Long-range changes, however, would be handled with scenario-based planning, or after-next planning. The Corps is currently beginning the merge the two initiatives.

Strategic planning differs from other recent management initiatives. Total Quality Management, or TQM, addresses the question of how to create a better product. Reengineering focuses on how to get the product to customers more efficiently. Strategic planning, however, addresses the even broader question of whether anyone will need the product in the future. The concept of reinvention of government includes the expectation of the Administration and Congress that we examine our role and mission in order to help inform the debate about our future.

Scenario development involves examining more than one possible future for the Corps. The team arbitrarily picked the year 2020 to frame a variety of possible futures and a determination of how to get there. They planned backwards and planned for good and bad.

Scenario development requires several steps to establish a range of possible situations. First, the team brainstormed to determine what kinds of forces may affect the future. Then they organized and grouped the forces, looking at the degree of importance and degree of predictability of each group. Uncertainties are those forces with high importance but low predictability; trends are those forces with high importance and high predictability. The team looked at socio-economic



Steve Reynold, Strategic Management and Innovation Division, CERM, HQUSACE gave a presentation on scenario-based strategic planning to the group on Monday afternoon.

conditions and political/cultural climates, from prosperity and growth to depression and instability for the former, and from peace to conflict for the latter. They examined each of these factors from the perspective of the world scene, the domestic scene, and the U.S. Government scene. The team developed a description of each scene under each condition and climate. They looked at the external environment before even looking at the environment within the Corps.

Next the team examined the business the Corps is in and applied it to each scenario. They looked at customer activities and customer needs and evaluated them with respect to variables such as price sensitivity, timeliness, innovation, growth potential, competitors, and present USACE involvement. The team did not define needs in terms of current directorates and offices because the Corps should not be tied forever to that structure. They defined the battlefields where the Corps wants to compete and play a part.

The team then conducted an industry analysis according to different models. Under the competitive model, the team looked at the value created based on different factors. It was

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USACE Strategic Planning, *continued*

a zero-sum model; for the Corps to win, somebody has to lose. Some functions, for example the regulatory function, may not add retained value, but because we are the government and regulating is our job, we do it. We need to build a strategy to do it efficiently. Under a different model, dubbed “coopetition” because it is a combination of competition and cooperation, the team assumed that total value can expand by creating win-win opportunities.

The team then examined our core competencies to determine what are our key success factors, or future core competencies. They ranked the key success factors to determine if there are gaps in core competencies and decide whether we want to acquire new core competencies for the future. During their conference in August, the senior leaders of the Corps will make decisions regarding acquisition of new core competencies and further implementation of the Strategic Plan.

During a question and answer session, Mr. Reynolds addressed questions on decisions regarding the added value of Corps functions, determination of customer needs, change in internal constraints, funding of strategic planning working groups, elimination of services, and the proactive nature of strategic planning. ♦

Total Quality Management, or TQM, addresses the question of how to create a better product. Reengineering focuses on how to get the product to customers more efficiently. Strategic planning, however, addresses the even broader question of whether anyone will need the product in the future.



Madeline Shay, NAD-OC and Lorraine Lee, District Counsel CENAN.

Planning Issues Affecting Decision Documents

Zoltan Montvai, *Civil Works Planning Division (CECW-P)*

Zoltan Montvai discussed the approval process for the documents which are required prior to approval of the project cooperation agreement (PCA). He explained that Civil Works projects considered for implementation must have an approved decision document prior to submittal of the PCA for headquarters review and approval.

Mr. Montvai defined the term “decision document” as (1) a document, typically a report, that is used as the basis of a decision to commit resources, or (2) a report with National Environmental Policy Act (NEPA) documentation, prepared for the purpose of obtaining authorization or commitment of funds. Mr. Montvai gave several examples of decision documents. He then explained the difference between Category I Projects, or Corps recommended projects, and Category II Projects, those that Congress directs the Corps to complete with or without Corps recommendation or budgeting. In the last three years, the Corps has received an increasing

number of Congressionally directed projects that do not enjoy the benefit of a Corps report. Sometimes the Congressional cost estimates are too low.

Mr. Montvai explained the Corps two-phased study process, which consists of both a reconnaissance and a feasibility study. Reconnaissance studies can now be done on an expedited basis. The objective of the reconnaissance study is to enable the Corps to determine whether or not planning to develop a project should proceed to the more detailed feasibility stage. The feasibility phase on average takes three times as long as the reconnaissance phase is 50% funded by the sponsor. The objective of the feasibility study is to investigate and recommend solutions to water resources problems for submission to Congress for authorization.

HQUSACE has a Planning home page at <http://www.usace.army.mil/inet/functions/cw/cecw.htm>. Mr. Montvai detailed the information available on the planning home page.

AGENDA: Tuesday, May 19th

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| 8:00 - 11:45 | Civil Works Projects Decision Documents:
How to Get Your Decision Document Through
Headquarters Review (Breakout Below) |
| 8:00 - 8:30 | Planning Issues Affecting Decision Documents |
| 8:30 - 9:00 | Policy Issues Affecting Decision Documents |
| 9:15 - 10:15 | Legal Issues Affecting Decision Documents |
| 10:30 - 11:00 | Real Estate Issues Affecting Decision
Documents |
| 11:00 - 11:45 | Open Discussion on Civil Works Decision
Documents |
| 1:00 - 1:45 | Legal Certification of Decision Documents and
Agreements |
| 1:45 - 2:45 | Panel Discussion: Division Quality Assurance
(QA) |
| 3:00 - 4:00 | Panel Discussion: Dredged Material
Management |
| 4:00 - 4:30 | Open Discussion |

Mr. Montvai explained that there are other types of decision documents designed to serve the goal of resolving issues and policy concerns as they arise during the study rather than identifying and resolving issues after decisions are made. The other decision documents include general reevaluation reports, design memoranda, general design memoranda, and post authorization change reports. There are also Congressionally directed decision documents. All decision documents must contain the following: a full description of the scope of the project, a current economic analysis, changes from the last approved document and rationale for the changes, a full description of allocation and apportionment of project costs, a NEPA document with certification of compliance with applicable environmental laws and requirements, identification of project items of local cooperation, and evidence of sponsor support with a financial capability analysis.

Mr. Montvai explained the process in Washington after the decision document receives a policy review at headquarters. The Chief's Report is submitted to the ASA(CW), then to OMB for review and Administration clearance before the report goes to Congress. After the feasibility report/decision document is submitted to Congress, the ASA(CW) approves the decision document and signs the Record of Decision.

In a question and answer session, Mr. Montvai addressed questions about other project types, in addition to the two categories which he discussed, and electronic submittal of sponsor reports. ♦

Tuesday, May 19th

Policy Review Issues Affecting Decision Documents

Steve Cone, *Chief, Management and Review (CECW-AR)*

Steve Cone set out to acquaint the workshop participants with the process of policy compliance review. He covered the following topics: policy review organization, technical and policy review guidance, requirements for obtaining policy review, the review process and products, scope of review, policy homepage and how to find guidance, and some of the common problems encountered in review (both analysis and process).

The Policy Review Branch manages and coordinates the Policy Review Team for policy compliance review of Civil Works decision documents. Members are assigned from the Offices of Management and Review and Environmental Policy to work on the PCA team. Other review staff includes counsel, an engineering and operations liaison, a cost engineering reviewer, a real estate expert, a programs liaison, and other headquarters staff.

Technical and policy review guidance principally consists of EC 1165-2-203, EC 1165-2-204, and Appendix O of ER 1105-2-100. Mr. Cone reviewed the definitions of project documents, including decision documents and implementation documents, quality control plans, quality assurance, technical review, technical review certification and findings, and policy compliance review. He then discussed the roles

and responsibilities of districts, divisions, headquarters, and the Office of the Assistant Secretary of the Army for Civil Works in technical and policy review.

Mr. Cone explained the requirements for policy review. He listed the requirements paperwork which must accompany a draft or final decision document sent forward for review. He then discussed the review process and products, including the value added, guidelines for review comments, establishment of a record of review, procedures and interaction with headquarters functional program managers, final feasibility reports, and follow-up actions. Mr. Cone discussed the review schedule and current workloads. He explained that Policy Review Branch has under review approximately forty actions at all times.

Mr. Cone discussed some of the common problem areas in policy compliance review. He explained that if the process is followed correctly, the analysis will be done thoroughly and completely. Finally, he discussed common problems with the review process. ♦



Civil Works Projects Decision Documents Panel: left to right are Zoltan Montvai, Tom Cooper, Scott Murphy, and Steve Cone.

Legal Review of Decision Documents

Scott Murphy, *Assistant Counsel for Civil Works*

CPT Scott Murphy offered attendees a rapid overview of his method of providing HQUSACE's primary legal review of project decision documents submitted by the field during the past year. He suggested that field attorneys consider reviewing decision documents by organizing their review to match the general structure of a run-of-the-mill feasibility report; i.e., by seeking to investigate and resolve issues of (1) process, (2) authority, (3) project purpose, (4) project area, (5) plan selection, (6) plan implementation, and (7) environmental compliance.

In discussing "process" questions, CPT Murphy noted that field attorneys might save considerable time in their review of decision documents by considering the type and stage of review of the report. For instance, reconnaissance reports and reports which have been subjected to prior review in the field and at HQUSACE often permit less time-consuming review than draft feasibility reports. CPT Murphy stressed the importance of District Counsel review of decision documents, highlighting the model language in Appendix A of EC 1165-2-203 and contrasting it with various "conditional" and "limited" reviews which his office had periodically seen.

CPT Murphy spent much of his presentation on authority issues in decision documents. He recommended that every decision document both cite and summarize the statutory authority upon which the decision document is based. CPT Murphy also discussed the recurring problem of decision documents which failed to resolve apparent changes in projects in excess of the discretionary authority of the Chief of Engineers. He recommended that attorneys desiring information on the Chief Counsel's current interpretation of the Chief's discretionary authority to look to the 1979 case of *EDF v. Alexander*, which considered project changes to fall within the Chief's discretion so long as they did not materially change the project's purpose, area served, cost, scope, cost or plan of improvement. *EDF* noted two exceptions to the general rule barring material changes, specifically for minor design refinements or for changes to accommodate new physical or legal conditions. CPT Murphy acknowledged a line of case authority which permitted post-authorization changes so long as the changes were not "arbitrary and capricious," but recommended against too much reliance on those cases. He advised that attendees pay close attention to the intent of Congress as expressed in a project's statutory authority, and not forget to

General themes for reviewers to keep in mind in tackling legal issues raised by decision documents: (1) seek advice and information from non-attorneys; (2) fully document resolution of borderline or controversial issues; (3) use clear writing that avoids jargon and which is aimed at the non-lawyer and non-engineer; and (4) get involved in the project planning process as early as possible.

check the host of general statutory authorities which permit the Chief increased discretion, before turning to the more uncertain authority contained in case law.

CPT Murphy then highlighted common issues which arise for the Corps' more common project purposes. For navigation projects, he noted the redefinition of dredged material disposal facilities as general navigation features by Section 201 of the Water Resources Development Act (WRDA) of 1996. For structural flood control projects, he noted the new cost sharing and flood plain management plan provisions in Section 202 of WRDA 96. For environmental "work," CPT Murphy advised that field attorneys take special note of the varying program and project funding limits for implementing environmental features. For recreation projects, CPT Murphy advised that attorneys ensure that decision documents not recommend stand-alone recreation projects or exceed current "austerity" guidance. CPT Murphy noted the growing interest in water supply storage reallocation at existing Corps reservoirs, and referred attendees to the Chief Counsel's recent opinion on the Corps' authority to sell storage to nonpublic entities, as well as recently revised model agreements in Appendix K to ER 1105-2-100. Finally, in a brief mention of shore protection projects, CPT Murphy indicated the potential for a change in cost sharing of such projects which might remove their current disfavor with the Administration.

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Legal Review of Decision Documents, *continued*

In a brief discussion of “project area” issues, CPT Murphy recommended that legal reviewers take note of any socioeconomic, physical, or legal changes in a project location which might validate a post-authorization change. He also advised that reviewers watch for any indications of the existence of any endangered species or critical habitat, which would trigger heightened environmental compliance requirements. Lastly, CPT Murphy noted that any existence of HTRW in a project area could trigger the Corps’ current policy barring expenditure of Civil Works funds on remedial actions, as described in ER 1165-2-132.

In his presentation on “plan selection” issues, CPT Murphy recommended that attorneys not completely ignore a decision document’s discussion of plan formulation, since the National Environmental Policy Act requires that federal actions be informed as to their environmental consequences and ER 1105-2-100 requires that all reasonable plan alternatives be considered. CPT Murphy briefly discussed the issue of locally preferred plans, noting that their federal support requires special permission from the Office of the Assistant Secretary (Civil Works) and referring attendees to ER 1105-2-100 para. 5-16 and Planning Guidance Letter 97-10 for further direction.

CPT Murphy spent a considerable period on plan implementation issues. He noted the need for detailed descriptions of project cost sharing and recommended that unified tables be included in decision documents, including year-by-year tabulations of federal vs. nonfederal project costs based on project purpose and on the relation of project expenses to the provision of lands and damages, preconstruction engineering and design, construction, or operation and maintenance. CPT Murphy also stressed the crucial need for a detailed listing of local cooperation items, in order to ease negotiation with the sponsor of a project cooperation agreement as required by Section 221 of the Flood Control Act of 1970 and Section 912 of WRDA 86. As further guidance on preparing such lists, he referred attendees to multiple sample lists of local cooperation items contained in the conference deskbook materials, but stressed that each decision document should contain a customized list suited to the project’s authorities and needs. CPT Murphy

mentioned a few of the more important items to be included in such lists, including cost sharing descriptions for projects with multiple purposes, cost sharing of preconstruction engineering and design, provision of necessary water rights, and discussions of any special requirements necessary to implement the project. CPT Murphy concluded his discussion of plan implementation issues by discussing special sponsor issues. He advised that any lack of sponsor support for or ability to implement the project should be openly discussed and resolved in the decision document, and warned that any grant of sponsor credit or reimbursement for work-in-kind by the sponsor would normally require ASA(CW) approval and execution of an agreement prior to the sponsor work.

CPT Murphy briefly touched on “environmental compliance” issues, recommending that attorneys look to available federal and private educational courses on environmental laws and regulations for more detailed guidance on reviewing environmental assessments and impact statements. He noted that legal reviewers should take care to ensure that decision documents distinguish between environmental work necessary for mitigation of project impacts and work to enhance or restore existing environmental conditions, which requires more specific authority such as Section 1135 of WRDA 86 as amended or Section 206 of WRDA 96. CPT Murphy also noted that confusion still appeared to exist in the field concerning the Corps’ policy prohibiting federal cost sharing of remediation of hazardous, toxic or radioactive waste materials on project sites. As stated in ER 1165-2-132, this prohibition is limited not to Superfund sites but also to any project site containing materials which are regulated under CERCLA.

CPT Murphy concluded his presentation by noting some general themes for reviewers to keep in mind in tackling legal issues raised by decision documents: including that they should try to (1) seek advice and information from non-attorneys; (2) fully document resolution of borderline or controversial issues; (3) use clear writing that avoids jargon and which is aimed at the non-lawyer and non-engineer; and (4) get involved in the project planning process as early as possible. ♦

Real Estate Issues Affecting Decision Documents

Tom Cooper, *Directorate of Real Estate, HQUSACE*

Tom Cooper, an attorney in the Directorate of Real Estate, discussed real estate issues affecting decision documents. Some of the legal concepts involve estates in land, the navigation servitude, and the fifth amendment and just compensation.

Real Estate recently issued a revised Chapter 12 of the Real Estate Handbook. Paragraph 12-16 lists the items that should go into the Real Estate Plan (REP), which is an interpretation of the fifth amendment as it applies to the project. The REP describes the existing condition and what is needed for the project, which requires extinguishing competing interests. The Corps has taken a functional approach to acquisition and acquires the minimum interests needed to support the project to achieve the benefits.

The REP should account for all land underlying and required to support the project, whether or not it will need to be acquired or credited to the sponsor, and includes land already owned by the Government and the sponsor. It should show acreages, estates, number of tracts and ownerships, and estimated value; break down total acreage into fee and various types and durations of easements; and break down acreage by Government, sponsor, and private ownership.

Standard estates should be used whenever possible as they have a condemnation and appraisal history. The key consideration for CERE-A of non-standard estates is whether they meet DOJ standards for use in condemnations. Justification for use of proposed non-standard estates must be provided, and approval should be sought as part of document approval.

An interest in land provided as an item of local cooperation for a previous Federal project is not eligible for credit. However, additional interest in the same land is eligible for credit.

If land is under the jurisdiction of the Army or another Federal agency, a description of the acreage and interest should be provided as well as the views of the affected agency and how the Corps will obtain use of the land.

Land within the navigation servitude is not required or eligible for credit for a Federal navigation or flood control project or other project to which a navigation nexus can be shown.

The REP should also discuss or include maps; a baseline cost estimate for real estate; discussion of relocation assistance benefits (mandated by Public Law 91-646); mineral activity; sponsor's capability and experience in land acquisition; zoning in lieu of acquisition; schedule of milestones to which the district and sponsor agree; landowner attitudes; HTRW; and other materials that aid understanding of the real estate aspects of the project.

Particularly careful analysis is needed when dealing with utility or facility relocations. In determining whether a substitute facility if involved, the facility must be impacted by the project; there must be a compensable interest; it must be a public utility or facility; it must have a duty to replace the utility or facility; and the fair market value must be too difficult to determine or its application would result in an injustice to the landowner or the public. ♦

Standard estates should be used whenever possible as they have a condemnation and appraisal history. The key consideration for CERE-A of non-standard estates is whether they meet DOJ standards for use in condemnations. Justification for use of proposed non-standard estates must be provided, and approval should be sought as part of document approval.

Tuesday, May 19th

Legal Certification of Decision Documents and Agreements

Moderator: Scott Murphy, *CECC-J*

Panel:

Kristin Budzynski, *CENAB-OC*

George Craig, *CELRP-OC*

Pat Billington, *CEPOD-OC*

Kay Hutchison, *CESPK-OC*

This panel was assembled to discuss procedural issues and the attorney's role in review of PCAs and decision documents.

Kristin Budzynski discussed her experience in changing the relationship between the Office of Counsel and planning and project managers. The relationship was antagonistic when she first arrived because there was not a history of effective communication. Ms. Budzynski started "Operation Friendly," a humorous title for her effort to make counsel accessible and open to questions. She promoted preventive law and early involvement of counsel in order to avoid problems.

Ms. Budzynski explained that she negotiated a written partnering agreement between counsel and management. Both sides have honored the agreement. Although she may not review all documents, she knows that she will be consulted for resolution of legal issues as they arise. As the PCA is drafted, counsel knows what it should contain so that it can quickly be certified for legal sufficiency. Ms. Budzynski reiterated that communication with the client is essential to the process.

George Craig discussed his experience in communicating with planning and the project managers. He told of specific instances in which he used his lawyering skills to resolve issues such as whether an entity fit the definition of a sponsor. He stressed that early involvement prevents later embarrassment.

Kay Hutchison explained that her goal is to maintain a close working relationship with her clients. She wants them to know that counsel is part of the technical review team and is available to give advice and guidance. She aims to raise red flags but be a facilitator, not an obstruction, to the process. Ms. Hutchison explained that an effective tool is use of EC 1165-2-203 as a checklist. She discussed the fact that an attorney has other duties and must become more efficient in



Legal Certification Panel: left to right are Kristin Budzynski, Kay Hutchison, Pat Billington and George Craig.

order to become effective. She suggested that the Corps develop a chat line on the internet to discuss common issues and assist in finding solutions. She also suggested that field counsel contact headquarters to obtain preliminary reads on complex issues.

Pat Billington explained that she looks at work product from the viewpoint of the district. She explained that the pre-PRB meetings are a good learning tool. Although prior to the conference there has been scant legal guidance on review of documents, she starts with the NEPA documentation and then works out, identifying contradictions and carefully reviewing before drafting a memo on the principal issues. When she receives the second draft of a document, she tries to focus only on those issues which she has already raised. Ms. Billington understands that legal review cannot accomplish all reviewing goals and that each document needs independent technical review. Her goal is to keep the project moving.

In a question and answer session, the members of the panel addressed questions on counsel involvement after project authorization, district and division roles in quality assurance, and counsel quality assurance. ♦

Tuesday, May 19th

Division Quality Assurance

Doug Lamont, *Chief, Policy Review Branch (CECW-AR)*

Doug Lamont, Chief of the Policy Review Branch, moderated a panel on Division Quality Assurance. Panel members included Bill Osborne (SAD), Tom Hill (MVD), Ray Russo (SWD), John Tsingos (SPD), and Sam Tosi (NAD).

Bill Osborne noted that the QA/QC process is directed to getting a quality product to the customer in a timely manner. Quality control is the district responsibility. For A-E contracts, the contractor is responsible for quality control with the district responsible for QA. The Division Commander, regardless of the size of the organization, needs QA. Divisions must develop quality management plans and must review and concur in district quality management plans for every activity. Approval and monitoring of the district's quality control plan requires an assessment of the district's QC process and the review and evaluation of performance indicators. Also, upcoming stumbling blocks must be identified.

Tom Hill stated that MVD views itself as a consultant and advisor to the district staff. The division staff must know the project and the report and must be continually involved by e-mail and phone. It must facilitate and address problems as they come up; waiting until the report lands on one's desk is too late. MVD will not process a PCA without a complete check list, which MVD spot checks.

Ray Russo noted that the QA process normally involves after-the-fact checks; however, nothing is standard anymore. The division is starting to get involved earlier with the districts on policy issues and in working them with CECW-AA. There is greater involvement in the decision documents. Section 211 commitments by the commander were noted. Everyone must be informed as the PCA process progresses.

Sam Tosi noted NAD's decision that Planning would be responsible for decision documents. Key factors are early involvement and communications. A QA audit on NED found that it was "up to snuff."

John Tsingos analogized the PCA process to a used car sale, where the sponsor negotiates with the district, which must get approval from the division, which must get approval from HQUSACE, which must get approval from OASA(CW). He questioned whether the division and Headquarters added value to the PCA process and whether execution should be at

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the district level or whether negotiation should be directly between ASA and the sponsor. He noted his division's emphasis on areas in which it can add value, with the PCA process not part of it.

Mr. Lamont noted that the PCA process can be cumbersome and that improving the delivery of services is an ongoing issue. He reiterated the relationship of the decision document and the PCA and how the appropriations process is driving the train. In response to a statement that Alternative Formulation Briefings are not worth it because the type of information being required for an AFB is not available until a month before the report will go up, Mr. Lamont said he would look into this issue. He stated, however, that an AFB should be early but not premature, as this is generally HQUSACE's first opportunity to view the potential project. Early issue identification and resolution at this point saves time when the draft report is reviewed. ♦

Tuesday, May 19th

Dredged Material Management

Rich Worthington, *CECW-AA*

Joseph Bittner, *HQ Programs Division*

Rich Worthington discussed the 1996 Water Resources Development Act (WRDA). One of the biggest changes in WRDA '96 were the cost-sharing provisions for disposal of dredged material. Dredged material management has become a major issue. Mr. Worthington reviewed the legislation and guidance letters which govern this issue. WRDA '86 prevented consistent cost-sharing of open water disposal vs. upland/confined disposal sites needed for construction, operation or maintenance of any navigation project. Section 201 of WRDA '96 now requires such disposal costs to be cost shared in the same proportion as the project's general navigation features. Section 201 also provides that the federal share of operation and maintenance costs of the disposal facilities will be 100%.

Mr. Worthington discussed the Harbor Maintenance Trust Fund and the costs which it is designed to cover. He then discussed Section 217 of WRDA '96, which assists implementation of Section 201 by authorizing formation of dredged material management partnerships. He explained the details of Section 217, including authorization for the federal government to construct multi-use disposal facilities and sell or charge for use of excess capacities. Although Section 217 authorizes the Corps to enter into agreements with non-federal entities to pay fees for use of private disposal facilities, we have not entered into any such agreements yet and do not have a model agreement.

Mr. Worthington discussed the definition of a dredged material disposal facility and what may or may not qualify as such. He explained that it is a case-by-case determination. He then discussed when the new cost-sharing scheme would apply to a disposal facility. Finally, he explained the approval process for cost-sharing at an existing facility.

Joseph Bittner gave information on his past experiences with dredged material management. He explained his current position at headquarters. He stressed the importance of effective communication when contacting headquarters; needs cannot be met if the wrong people are consulted.

Mr. Bittner discussed confined disposal facilities and local interest in participation with these types of facilities. He explained that our budget for creating CDFs is small, but the federal share will eventually be offset by the Harbor Maintenance Trust Fund. The Committees have approved one project so far, and there is another request currently undergoing review at OMB.

During a question and answer session, the panel addressed questions about funding, the payback provision for advancement by a non-federal sponsor, and cost-sharing requirements for pre-1986 facilities. ♦



Wednesday, May 20th

Civil Works Agreements

Doug Lamont, *Chief, Policy Review Branch, CECW-AR*

Howard Goldman, *Senior Counsel for Civil Works, CECC-J*

Doug Lamont, Chief of the Policy Review Branch, began Wednesday's session by describing the PCA approval process and noted that the "problem projects" tend to be the Congressional adds. Each PCA, including PCA amendments, must be based on a decision document. The decision document must address authority, scope of the project, current economics, and changes from the last approved decision document. Other items include unusual aspects such as work-in-kind, betterments, mitigation, or locally preferred plan; the cost sharing allocation; M-CASES cost estimate; certification of NEPA compliance; identification of project cooperation requirements for construction and OMR&R; and reaffirmation of the sponsor's willingness and financial capability to participate.

Mr. Lamont provided a quick refresher to development of the draft PCA. The initial draft PCA should not be an enclosure to the decision document and should be based on an approved model PCA (or adapted from the structural flood control model if there is no draft), with the PM responsible for managing the PCA development and negotiation. Negotiation of the PCA may occur when Washington level review of decision documents is complete and either the



Doug Lamont opened Wednesday's session with a presentation on Civil Works Agreements.

President's budget requesting initial construction funds has been released or for Congressional adds, funds have been appropriated and the VTC MFR has been approved. The negotiation shall be conducted by a small interdisciplinary team, which at a minimum includes PM, counsel, and a cost engineer. Should major, unresolved issues arise, PM should consult MSC and CECW-AR. District Commanders should keep Congressional delegations informed and invite them and ASA to signing ceremonies.

Mr. Lamont then set out the procedure for PCAs requiring Washington Level Review. The HQUSACE focus is on making sure that the project authorized is the project being built and on confirming that CG funding is available. The submittal must list deviations and explain the need for any deviations. After ASA(CW) approval of the PCA, the district has twenty-one days after CECW-AR written notification to execute with no deviation from the ASA(CW)-approved PCA, and if the suspense cannot be met, it must notify CECW-AR of changed conditions and course of resolution.

Mr. Lamont emphasized that MSC and District Commanders do not have authority to make unapproved changes with the exception of correcting typos, revising project cost estimates in accordance with an approved SACCR, and changing the first/last paragraph of PCA and signature block for Commander's signature.

AGENDA: Wednesday, May 20th

8:00 - 10:00	Civil Works Agreements (Feasibility Cost Sharing Agreements; Project Cooperation Agreements)- HQ Review, Deviations, etc.
10:15 - 11:30	Civil Works Agreements - Work-in-Kind, Reimbursements, New Programs and Directions
11:30 - 12:00	Open Discussion on Civil Works Agreements
1:15 - 2:15	The State of the Corps
2:15 - 2:45	Civil Works Agreements: Save and Hold Harmless Requirements
3:00 - 4:00	Civil Works Project Case Studies: <ul style="list-style-type: none">- Holes Creek Ohio, Local Flood Protection Project- Los Angeles Harbor Deep Draft Navigation Improvements
4:00 - 5:00	Open Discussion - completion of panel

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Civil Works Agreements, *continued*

Howard Goldman then described PCA clauses and noted deviations and unusual provisions. The Whereas Clauses set out the underlying authority and appropriations limits as well as other important pre-PCA activities. Article I Definitions should fully describe the project and decision documents, including supplements and key definitions, including total projects costs, multiple project features, GNF, local service facilities, incremental costs, and betterments.

Article II sets out the obligations of the parties and may include a voluntary cost cap. It also allows for deferral (not termination) of a project if the sponsor doesn't get funds; however, the ASA(CW) may complete the project pursuant to section 103(j)(2)(A) of WRDA 86. This article should thoroughly describe the cost sharing, including credit for LERRDS or work-in-kind. In addition, Article II covers acceptance of advanced funds from the non-Federal sponsor, an issue that has been problematic recently. Some of the other items to be covered in Article II include grant restrictions on the non-Federal funds, items of local cooperation, floodplain management requirements, and public use and access requirements for beach nourishment and recreation projects.

Articles III and IV deal with the LERRDs requirements. Issues discussed include disposal facilities; non-Federal sponsor's risk in acquiring LERRDs prior to PCA execution; stipulation of LERRDs value; multipurpose project purposes; unusual authorizations, such as 100% Federal funding; LERRDs cost sharing restrictions (such as for section 313 projects); and incidental costs, such as attorney fees and title evidence). The Government ultimately makes the final determination of LERRDs.

Article V deals with the Project Coordination Team. The Government makes final decision with rare exceptions. Additional parties may be added at non-Federal expense.

Article VI deals with method of payment. All cost breakdowns must be fully described. If non-Federal funds are not used in proportion to Federal funds, an advanced funds situation exists that can be problematic if the project is not completed and a reimbursement is required. Methods of payment include cash, escrow agreement, and irrevocable letter of credit. After a final accounting, funds paid by the sponsor in excess of its obligations may be returned subject to the availability of funds but without interest for any late Government payment. If additional sponsor funds are needed, payment will be required by a date certain, which is negotiable, with the sponsor subject to interest for late payments.

Article VII contains the ADR provisions, with any costs of ADR shared equally.

Article VIII deals with OMRR&R, which is almost always a non-Federal sponsor responsibility. The Government, however, performs O&M of GNF, including dredged material disposal facilities. For H&SDR (beach) projects, sponsor performs OMRR&R between periodic nourishment cycles (which are considered construction) and performs monitoring. Another critical provision in Article VIII is the Government right of entry to inspect completed works, with Government delivery of the OMRR&R manual as a key requirement in determining that the project is complete.

Other articles include Article IX (Indemnification), which is discussed in detail later in the day; Article X (Audits); Article XI (Federal and State Laws); Article XII (Relationship of the Parties); and Article XIII (Officials Not to Benefit).

Article XIV requires suspension or termination if the sponsor breaches cost sharing requirements and provides for permissive termination if there is no Federal funding. Section 912 of WRDA 96 provides additional Federal remedies. Termination doesn't relieve the parties of incurred obligations.

Article XV deals with Hazardous Substances and provides for use of CW funds during the investigation phase but not for cleanup. There have been many sponsor deviation requests, which have been denied if they shift responsibility for the response plan and implementation.

Article XVI requires official delivery of notices; Article XVII deals with Confidentiality; and Article XVIII covers Historic Preservation. Article XIX sets out the section 902 project cost limits. If Congress increases a 902 limit, the increase is self executing and an amendment to the PCA is not needed. Article XX deals with obligations of future appropriations and has limited availability.

A new article provides for limitations on Government obligations and is used for Congressional adds and earmarked funds. Generally, the Administration will not budget for Congressional adds, which a sponsor can elect to continue at sponsor expense. If there is no sponsor commitment to complete at sponsor expense, there should be a reserve fund for termination expenses. Also, a useable increment of work (which may be less than a separable element) may be constructed with the earmarked funds.

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Civil Works Agreements, *continued*

Doug Lamont then turned to the issue of work-in-kind. CW policy is that where the law requires non-Federal cash contributions, work-in-kind cannot be substituted. Special provisions that allow credit or reimbursement include Section 215 of the Flood Control Act of 1968 and sections 104, 203, and 204 of WRDA 86. In addition, Section 105(a) of WRDA 86 allows that not more than one half of the non-Federal contribution for studies may be made by in-kind services. The general policy is to provide credit first against sponsor's LERRD requirements or additional cash requirements. Prior to initiating negotiations on reimbursement agreements, the Secretary of the Army must notify the House and Senate Appropriations Committees.

Mr. Lamont also touched on the status of approved models and noted that the revised commercial navigation model is almost complete. He also discussed MSC QA responsibilities as they relate to PCAs.

At this point, Mr. Lamont and Mr. Goldman addressed questions from the attendees, which included the following discussion. There are no hard and fast rules as to what triggers an amendment to the PCA; use a common-sense approach. There is likely to be no exception for work-in-kind in the new design agreement. It is not the Government's responsibility to explain to the sponsor's the Article XI applicable laws and regulations; the sponsor should get this information from its attorney. If there is an irreconcilable difference between the sponsor and the district, the package should not go forward as there is no meeting of the minds; issues can be raised offline by e-mail or phone with CECW-AR. It is not yet clear whether construction of a section 211 of WRDA 96 project must show cost savings over Federal construction. There was much discussion on the problems associated with requiring a state Clean Water Act certification prior to PCA execution. ♦

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Wednesday, May 20th

The State of the Corps

LTG Joe N. Ballard, *Chief of Engineers, HQUSACE*

Lieutenant General Joe N. Ballard, Commander, U.S. Army Corps of Engineers, addressed a joint session of the USACE Legal Services Senior Leadership Conference and Civil Works Workshop on Wednesday afternoon. He began by noting that the Chief Counsel, Mr. Lester Edelman, has announced his retirement this summer, and he thanked Mr. Edelman for all the great work he has done for the Corps and the country.

General Ballard presented the “Bigger Picture.” He explained that he is working on change throughout the Corps to revolutionize the way we do business at every level of the Corps. He stressed that although we’re doing fine, we can do better. The Corps must change because the world has changed the way it does business; the current structure, designed during the Cold War, does not reflect the shift in geopolitical priorities or the vast changes in technology. Therefore, the Corps must change to stay in the forefront.

General Ballard explained that he has two initiatives underway to implement change. First, he established the division as a Business Center. Under this effort all districts within a division are unified as one business center. He noted that there are several fundamental problems with the old structure: districts spent too much time looking for work instead of executing projects; there was an attitude of competition among the districts rather than a team approach; each district thought it had to be fully self-reliant in obtaining and doing its work; there were no standard accounting practices among the districts; there was no oversight on district budgets; marketing efforts were fragmented and inconsistent, with districts sometimes pursuing the same customer; and customers dealing with multiple districts had problems with such matters as consistency.

General Ballard explained that the regional concept provides a single focus on the customer and standardizes practices, at least within a division. The divisions will adopt a business approach; they will have a regional management board to oversee the budget and manage work and resources across the division. A regional approach to marketing will result in an economy of force and effort. In addition, our partners will have seamless access to the Corps.

The regional business center initiative has been implemented with great success in the North Atlantic, South Atlantic, and Southwestern Divisions. It will be implemented throughout the Corps soon.



Chief of Engineers, LTG Joe Ballard, encouraged attendees to share ideas; “Don’t just get out of the box, build a new one.”

General Ballard’s second initiative concerns Program and Project Management. General Ballard explained that this will be the primary way the Corps does business; it will be organized around programs and projects, not stovepipes. There will be project delivery teams, consisting of team members with different roles (such as counsel, real estate, etc.) all mutually accountable and focusing on the job to be done. All team members are not required to be in the same location. The team leader will be the customer’s interface with the Corps. The end result will be a quality product and a satisfied customer.

General Ballard told the attendees that they will be the team members, and that he needs their skills, talent, and commitment to make it work. He noted that counsel and real estate are a vital part of virtually every project the Corps undertakes, but whatever our roles we are all first and foremost a representative of the Army Corps of Engineers. General Ballard challenged the attendees to take advantage of training opportunities such as this week’s workshop to take a hard look at how we do business and to look for new, innovative ways to make improvements. He encouraged them to share ideas; “don’t just get out of the box, build a new one;” and to continue to look for ways to build commitment with our customers. ♦

Civil Works Agreements: Save and Hold Harmless Requirements

Howard Goldman, *Senior Counsel for Civil Works*

Howard Goldman explained that save and hold harmless issues are among the most vexing problems on the non-federal side of agreements because of state and local constitutional and legislative issues. There is a longstanding federal policy dating back to the Flood Control Act of 1936 (33 U.S.C. 701c) that sponsors must save and hold harmless the federal government from damages due to construction works.

The save and hold harmless requirement is read in conjunction with other statutes, such as 33 U.S.C. 701f-2, Sections 101 and 103 of WRDA '86, and the WRDA '74 amendment, which adds the language "without the fault or negligence of the United States or its contractors." Mr. Goldman discussed the current language of the save and hold harmless requirement. The provision is explicitly required by Sections 101 and 103 of WRDA '86. The Army and Corps policy is to incorporate save and hold harmless provisions in all 221 agreements.

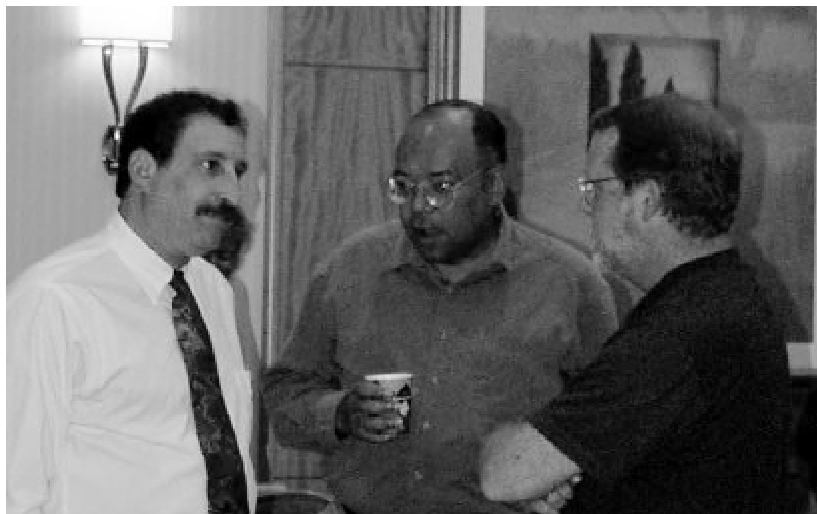
The problem with the federal requirement of a save and hold harmless provision is conflict with state constitutions, statutes, case law and local ordinances. Often the states cannot give indemnification because state laws or the state constitution prohibits obligation of future appropriations. The restriction is similar to the federal prohibition contained

There is a longstanding federal policy dating back to the Flood Control Act of 1936 (33 U.S.C. 701c) that sponsors must save and hold harmless the federal government from damages due to construction works.

in the Anti-Deficiency Act. Section 912 of WRDA '86 contains language which allows an agreement to reflect that the state is not obligating future state legislative appropriations. Nevertheless, Section 912 does not cover all types of appropriations nor all types of sponsors.

Mr. Goldman explained that many states are pressing the issue of save and hold harmless requirements. Wherever possible, the Corps should suggest to a sponsor that it seek enabling legislation in preparation for PCA completion.

During a question and answer session, Mr. Goldman addressed questions about good faith budgeting requirements, feasibility cost-sharing agreements, and insurance requirements. ♦



Taking a break left to right are: Howard Goldman (Senior Counsel for Civil Works), William Coleman (the Army General Counsel) and George Kingsley (District Counsel, Baltimore).

Civil Works Project Case Studies:

Holes Creek, Ohio, Local Flood Protection Project; Los Angeles Deep Draft Navigation Improvements

Linda Murphy, PM, Louisville District

Brian Moore, Deputy District Engineer for Programs and Project Management, Los Angeles District

Linda Murphy discussed her experience with the Holes Creek, Ohio, Local Flood Protection Project. This is a project with a locally preferred plan and an “imaginary” NED plan. She explained that during this project, she worked through many of the problems which were posed as hypotheticals during this conference.

Ms. Murphy discussed the location of the project. The area was less than one mile of channel improvement over land dedicated to residential and commercial/industrial use. She then discussed the history of the project from 1967 to the present, including the authorization process, planning, and PCA execution.

Ms. Murphy explained the funding of the project. She discussed the sources and timing of the funding. She demonstrated that there was not a large difference between the NED plan and the locally preferred plan. She discussed the many changes that took place through PCA negotiations. She explained that the changes were relatively easy because she received a lot of support from counsel.

Ms. Murphy showed a comparison of the funds required for the NED plan versus the preferred plan. Funding for the non-federal sponsor came from the communities that benefited from the project. The non-federal sponsor of this project was created specifically to act as the sponsor. Legal authority was written into the state code. Ms. Murphy compared the PCA data to the present data and explained the reason for a rise in price.

Brian Moore discussed his experience with the Los Angeles Harbor Deep Draft Navigation Improvements Project. Los Angeles and Long Beach Harbors are not a natural port. He showed the area in a photograph and explained where breakwaters have been created to make the area into an operable port. He discussed some figures for the Port of Los Angeles for imports for cars, oil, containers and the like.

The port does business with the Pacific Rim and across the country. It is expected to expand with an increase in imports and exports. There will be growth in employment revenues across the country because of the port. Expansion is a must; areas of open water must be dredged and filled to expand the port.



CW Project Case Studies Panel: Left to Right are Brian Moore, CESPL, Howard Goldman, and Linda Murphy CELRL.

The cost of the project is \$401 million, 24% of which is the federal share. The project was authorized in WRDA '86 and given special provisions in WRDA '88 and WRDA '90. Mr. Moore discussed the recommended plan, including mitigation efforts.

The feasibility study originally called for construction in three stages with the project sequenced over a number of years. Now the project has been changed to two stages. Stage one has been completed by the Port. This stage was part of a unique credit agreement. Stage two will be completed by the federal government. Construction of stage two is currently underway. Because the Port is trying to meet contract requirements with another company, the Port has begun some of stage two on its own.

Mr. Moore discussed the mitigation efforts which the Port has done. Mitigation was done elsewhere in order to obtain credits for this project.

Mr. Moore explained the unique aspects of this project. The project included special language in WRDA '88 and WRDA '90 to allow the Corps to initiate a credit agreement with a custom-tailored document modeled after the PCA language. Half of the work was done by the sponsor in advance of federal construction. The authorized project exceeds the

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Thursday, May 21st

Sponsor Financing of CW Projects and Review of Escrow Agreements and Irrevocable Letters of Credit

Sharon Wagner, *Regional Economist, Baltimore District*
Howard Goldman, *Senior Counsel for Civil Works, CECC-J*

Sharon Wagner provided an overview of the financial analysis requirements used in support of PCAs. The components of the financial analysis include the sponsor's Financing Plan, the sponsor's Statement of Financial Capability, and the district's Financial Assessment. At a minimum, the sponsor's Financial Plan must contain a schedule of estimated expenditures (including a discussion of LERRDs), a schedule of sources and uses of funds (that is consistent with the Government fiscal year), and an explanation of financing for all outlays. The Statement of Financial Capability must evidence the sponsor's authority to obtain and utilize identified sources of funding, determine the creditworthiness of the sponsor, and detail the relationship and commitment from third parties involved in project financing (although the sponsor is solely responsible regardless of arrangements with third parties). The district's Financial Assessment should summarize the sponsor's plan and capability, ascertain the reasonableness of the sponsor's commitment, and assess the risk of non-performance. In determining the reasonableness of the sponsor's financial commitment, the district should review the prior



Sharon Wagner, a Regional Economist in Baltimore District, provided an overview of the financial analysis requirements used in support of PCAs.

performance of the sponsor, the overall financial position of the sponsor, and the certainty of revenue sources and method of payment (to determine if they are sufficient, reliable, and timely, i.e., in accord with the PCA schedule).

Ms. Wagner cautioned that although the sponsor and the Corps may often view the financial analysis process as a bureaucratic exercise, one must overcome the urge to make the PCA a "fill in the blank" exercise. "Lessons Learned" include the signatory to the PCA is often not the actual financial contributor; sources and uses of funds must add up and be on the same time schedule according to the Federal/non-Federal Cost Allocation Table; O&M costs must be included in the Financing Plan; and timing is equal in importance to capability and affordability in a Financing Plan. Also, the district should be aware of competition for the sponsor's scarce resources and of the capital improvement plan to determine what other improvements are planned for the next three to five years.

(continued on page 23)

AGENDA: Thursday, May 21st

8:00 - 9:00	Sponsor Financing of CW Projects and Review of Escrow Agreements and Irrevocable Letters of Credit
9:00 - 10:30	The Civil Works Program - The Pentagon View
10:45 - 12:00	Panel Discussion - Project Management & Teamwork
1:15 - 3:15	Panel Discussion - The View from Our Project Sponsors
3:30 - 4:30	Open Discussion & Questions / Answers of Panel

Sponsor Financing of CW Projects, *continued*

Ms. Wagner suggested what the district should ask for and should avoid in the PCA Financing Plan. Things to ask for include data on cost-per-customer, source of payment and source of repayment of debt service, and who is the ultimate obligor of the financing. Things to avoid include the Corps acting as a financial advisor, sending the sponsor copies of other PCA financing plans, and specifically recommending a particular financing/funding option.

Following Ms. Wagner's discussion, Howard Goldman reviewed escrow agreements and irrevocable letters of credit. He noted that ER 37-2-10 Change 78 details the basic standards for financing instruments and requires a financially secure institute that is insured by the FDIC or is a nationally chartered, i.e., is a Federal Reserve bank, and an irrevocable deposit of the funds that can only be withdrawn by the United States. The Chief Counsel has delegated approval of the use of escrow agreements that conform to the model escrow agreement to Division Counsels, who in turn may delegate such approval to District Counsels. Deviations from the model escrow agreements must be approved by CECC-J. A sample (not model) Irrevocable Letter of Credit is available on the workshop website; use of an Irrevocable Letter of Credit requires CECC-J approval.

Mr. Goldman noted that there is a proposal to drop the requirement that ASA(CW) must approve any change in the

The Chief Counsel has delegated approval of the use of escrow agreements that conform to the model escrow agreement to Division Counsels, who in turn may delegate such approval to District Counsels.

number of days for payment submission, with such approval being delegated to District Engineers as well as a proposal to allow flexibility for the sponsor to change financing method during project execution of navigation projects.

In response to a question on whether the flexibility on switching methods of financing will apply to flood control projects as well, Mr. Goldman responded that it is not known at this time whether approval will be given for navigation projects so a "wait and see" attitude applies. In addressing the question on whether there had ever been a case where we "just said no" to a financing plan (in light of the pressure to approve them), a member of the San Francisco District noted a case where the first two collapsed and where a third one is being worked but which may require switching sponsors. ♦

Civil Works Project Case Studies, *continued*

NED plan. There is a fixed federal share, unlike typical cost-sharing arrangements. The Port will advance funds required for stage two and will be reimbursed by the federal government in the future in order for the project to be completed more quickly. There is also a unique cost-sharing arrangement for operation and maintenance. Mr. Moore explained that the sponsors and the Corps can work together to meet the sponsors' needs; good partnering makes it happen.

During a question and answer session, Ms. Murphy and Mr.

Moore addressed questions about changes to the NED plan, Clean Water Act compliance issues, litigation, operation and maintenance financing, and permit requirements. ♦

Thursday, May 21st

The Civil Works Program - The Pentagon View

Earl Stockdale, *Deputy General Counsel (Civil Works and Environment), Department of the Army*

Earl Stockdale, the Deputy General Counsel (Civil Works and Environment) for the Department of the Army, discussed this year's appropriations and authorization initiatives as a bellwether of where the Civil Works program is going. He noted that on April 22, 1998, the Administration forwarded to the Hill its legislative proposal on WRDA 1998. This legislative proposal carries a total cost of \$1.462 billion and includes five project authorizations.

The centerpiece of the legislation is section 4, which establishes a Flood Hazard Mitigation and Riverine Ecosystem Restoration Program. This provision encourages expanded use of nonstructural options in preventing or reducing flood damages and provides for a comprehensive approach, rather than a project by project approach, to the prevention of flood damages. Two interesting aspects of the proposal are (1) it allows the Secretary to undertake projects based on qualitative standards instead of the traditional quantitative standards and (2) once the Secretary determines that a project is justified, Congressional authorization is not required; the only limit is that the Secretary must provide the Congress with written justification 21 days prior to implementation. This proposal provides for 65% Federal/35% non-Federal cost sharing, with non-Federal provision of LERRDs, which can be credited to the non-Federal sponsor's cost share. In addition, O&M costs would be 100% non-Federal responsibility. Not more than \$75 million in Federal funds may be expended on any single project, and there is authorized to be appropriated \$325 million over six years.

Section 5 of the legislation provides new cost sharing for shore protection projects with the non-Federal share for initial construction remaining at 35% but with periodic nourishment at 65%. Section 6 raises the cap on the Federal share of section 205 small flood control projects from \$5 million to \$7 million. Sections 9 and 10 provide that nonprofit entities can act as sponsors for projects for aquatic ecosystem restoration or for beneficial uses of dredged materials; therefore, organizations such as the National Wildlife Federation and the Audubon Society can sponsor such projects. Section 11 authorizes entering into a cooperative agreement with non-Federal public bodies and non profit entities, such as the Student Conservation Association, for environmental protection and restoration, natural resources, conservation and recreation initiatives. Section 12 authorizes the Corps to accept contribution from states and political subdivisions for environmental restoration work.



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Section 16 establishes a Water Resources Foundation, a nonprofit corporation to provide private sector support for the Corps' natural resources management program. This provision is patterned after legislation establishing the National Fish and Wildlife Foundation, which conducts similar activities to support the USFWS and NOAA. This provision authorizes the Foundation to encourage, accept, and administer private gifts of money, real property, and personal property.

Mr. Stockdale noted that the Administration's WRDA 98 legislative proposal is significant for two reasons. First, it reflects the Administration's concern over the number of projects the nation can afford. Second, it represents an increased emphasis on the Corps' environmental restoration mission and reflects the Corps responsiveness to the changing needs of the nation.

On the appropriations side, Mr. Stockdale noted the problematic gap between the Congress and the Administration on funding civil works. In the FY 98 Appropriations Act, the Congress appropriated \$4 billion, which was \$700 million more than the Administration requested, and of the 66 new construction starts, 54 were added by the Congress. This kind of Congressional activism resulted in President Clinton striking 5 water projects that had not been in the Administration's budget. Further, in apportioning funds,

(continued on page 25)

The Pentagon View, *continued*

OMB provided that the 54 projects added by the Congress must be fully funded. It later expanded this requirement to include Administration budgeted projects. [Note: The Congress addressed this requirement in the recently enacted Emergency Supplemental Appropriations Act.]

The President's FY 99 budget requests \$3.2 billion in new appropriations, which is the maximum amount that the Administration believes can be accommodated within discretionary domestic outlays. This figure is 95% of last year's budget request and 80% of what was actually appropriated. The Administration and the Congress disagree as to where the Civil Works program fits within use of discretionary domestic outlays. Most stark is CG, which is budgeted at 55% of what was appropriated in FY 98.

Mr. Stockdale then turned to a discussion of the Supreme Court decision in *United States v. U.S. Shoe Corp.* The United States had argued that the tax established in WRDA 86 to fund the Harbor Maintenance Trust Fund was a user fee on use of ports, not a tax on exports and, therefore, was a legitimate means of regulating commerce. On March 31, 1998, the Supreme Court ruled that the tax was an unconstitutional tax on exports. The Court noted that basing the tax on the value of commercial cargo, rather than use, did not fairly measure use of port services. In light of this decision, the Government faces two challenges. One is to determine a strategy for refunding fees paid. The other is to develop new legislation for alternative methods to fund harbor maintenance.

Mr. Stockdale then addressed questions raised by the attendees. In response to a question on the applicability of the proposed WRDA 98 shore protection cost sharing to ongoing projects, he noted that he had provided an overview of the Administration's proposal and that the effective date as well as other issues on this proposal would be negotiated during the legislative process. He answered in the affirmative a question on whether shore protection projects are within proposed budget outlays assuming that shore protection cost sharing is enacted. In reply to a question on whether the Administration's proposed section 4 could be used for mitigation at existing projects, Mr. Stockdale commented that it was not being called a mitigation provision and suggested section 1135 and section 906 of WRDA 86 as available authorities. Responding to an inquiry on the likelihood of a WRDA 1998, Mr. Stockdale was optimistic and noted that the Congress had accepted the two-year cycle and wanted an authorization act. On being asked whether section 4 was so broad (based on the qualitative measures

language) that the Secretary could do anything, Mr. Stockdale agreed that the qualitative standards are very broad and provide the Secretary with room to push the envelope. He noted, however, that such a broad grant of authority was not without precedent and mentioned section 528 of WRDA 96 as including a similar provision for critical projects in the Florida Everglades. He suggested that (1) we would be careful not to abuse the authority, because Congress could always take away the authority and (2) there will be a full dialogue with the committees on how the authority will be used, both on a programmatic and on a project by project basis. Addressing a concern on whether the differences between the Congress and the Administration will interfere with the ability to go forward with projects, Mr. Stockdale noted that he did not know what the right number of projects is but he did know that the gap right now is too big and that last year when there were appropriations for 66 projects, 54 of them not being in the budget, no compromise or consensus was reached. The final questioner noted the problems at existing projects with the Endangered Species Act and asked whether the proposed WRDA 98 addressed how to allow easier compliance with the ESA. Mr. Stockdale responded that there is potential in provisions to acquire land and to improve and restore riverine ecosystems. He noted that the ESA is not like NEPA, which deals more with procedure as the ESA provides an absolute proscription. He suggested continuing to work in the consultation process to avoid findings of jeopardy. ♦

Mr. Stockdale noted the problematic gap between the Congress and the Administration on funding civil works. In the FY 98 Appropriations Act, the Congress appropriated \$4 billion, which was \$700 million more than the Administration requested, and of the 66 new construction starts, 54 were added by the Congress.

Thursday, May 21st

Project Management and Teamwork

Moderator: Bill Osborne, *Chief, Programs Division, South Atlantic Division*

Panel:

Brian Moore and Steve Temmel, *Los Angeles District*

Richard Bonner and Lloyd Pike, *Jacksonville District*

William Slezak and Ellen Simon, *New York District*

Bill Osborne, Chief of the Programs Division in SAD, moderated a panel discussion on Project Management and Teamwork. Panel participants included project managers and attorneys. From the LA District were Brian Moore and Steve Temmel; from the Jacksonville District were Richard Bonner and Lloyd Pike; and from the New York District, were William Slezak and Ellen Simon.

Brian Moore noted the continuing role of Counsel at all levels from the district on up and discussed uniform business process and its emphasis on the customer and the team, both horizontal and vertical. He emphasized the goal of commitment to the customer and emphasized a can do attitude, which looks at where the team and customer want to be and then applies best business practices to get there. He contrasted risk management with risk aversity and argued for full disclosure to the customer and sharing of experiences.

Acknowledging that the focus on the customer is good, **Steve Temmel** noted that it is not a new concept but started with Mr. Edelman's emphasis on client care. He stated that Mr. Edelman challenges us to think outside the box and to manage risk, rather than avoiding risk (which will never solve problems). He emphasized that the role of counsel is to get clients where they want to go. He noted that the letters in CARE of Client Care, according to the Chief Counsel, represent: Confidence (lay a foundation to gain the



Left to right: Bill Osborne (SAD), Lloyd Pike and Richard Bonner (SAJ)

confidence of one's clients because if we act as counsel and gain confidence and respect, it will be okay if we have to say no as long as we can explain); Attentive (to client's needs); Responsible for one's legal advice (outline various alternatives but note the consequences of each and then become an advocate of the option chosen); and strive for Excellence (always strive to be better, which will lead to excellence).

Lloyd Pike opined that the culture of the organization affects how one interacts, with the key being how to fit one's skills within the culture so that one can touch base with clients, including the non-Federal sponsor. He emphasized that the project sponsor is a member of the team that must feel special and unique and believe that the Corps is delivering something to it. Otherwise, he noted that there are other options for the sponsor out there, including doing the project itself and getting reimbursed.

Richard Bonner advised that project management is not an office: it's a way of thinking. PM envisions a team, with members coming and going but the core, including counsel, is there throughout the process. He noted the importance of the PRB and going through every project in detail. He stated



Left to right: William Slezak and Ellen Simon (NAN), Steve Temmel and Brian Moore (SPL).

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The View from Our Project Sponsors

Moderator: Rich Worthington, CECW-AA

Panel:

National Association of Flood and Storm Water Management Agencies:

Susan Gilson, *Executive Director*

Kay Whitlock, *Assistant General Manager, Santa Clara Valley Water District*

Ken Kendrick, *Principal Civil Engineer, Water Reclamation District of Greater Chicago*

Fred Nuffer, *Chief of Flood Protection Bureau, New York State Department of Environmental Conservation*

Bernard J. Moore, *Administrator, Division of Engineering, New Jersey State Department of Environmental Protection*

American Association of Port Authorities:

Tom Chase, *Director of Environmental Affairs*

Martha Williams, *General Counsel, Port of Houston*

David McKenna, *Assistant City Attorney, City of Los Angeles*

Rich Worthington explained the need for the panel and introduced each of the speakers. He explained that since WRDA '86, there has been a change in the role of sponsors because they bear a greater share of costs. Non-federal sponsors are now very much involved and even take the lead on some projects. He explained the importance of our relationship with both of the agencies represented by the panel. Both agencies assist in writing regulations and lobby for legislative proposals.

Susan Gilson discussed the long history between the Corps and the National Association of Flood and Storm Water Management Agencies (NAFSMA). She affirmed the group's commitment to partnership with the Corps. She explained that NAFSMA will conduct a survey of the status of this partnership for a report card on its success.

Kay Whitlock discussed the history of her agency and its work with the Corps. She explained that the agency interfaces frequently with Civil Works programs. She emphasized that an overarching theme is partnership between the Corps and sponsors in advocating projects to Congress and the Administration. She has seen a change in the relationship since WRDA '86, and she envisions more changes to come.

Ms. Whitlock explained that the Corps and sponsors are at a crossroads. We must learn how to get work done in a regulatory environment. She believes that we are moving from a stance of negotiation to one of collaboration. The Corps speaks of customers, but Ms. Whitlock expressed her wish that the Corps refer to sponsors as partners. Because

the sponsor is responsible for cost-sharing, the sponsor should be at the discussions table. Local agencies have better knowledge of what customers want. She explained that in a partnership, each partner knows the strengths and weaknesses of the others. She would like to see partners of different strengths being treating uniquely.

Fred Nuffer reiterated the concept that sponsors are our partners, not our customers. He stressed that there is a larger picture than just flood control, and the states can be supporters of other efforts as well.

Mr. Nuffer commended the Corps on being hard-working, energetic and professional, but expressed his regret that the Corps is bureaucratic. He believes that innovativeness is sometimes sacrificed in order to obtain Headquarters approval.

Mr. Nuffer discussed the WRDA '96 provisions for the New York watershed. He explained that the process for executing the New York watershed project is different. He hopes the new process will reduce costs and improve quality. He emphasized that the Corps must be willing to take risks in order to improve the process.

Bernard Moore discussed the increase in length and complexity of PCAs. He explained his experience with the Greenbrook project and the requirement that his agency issue air and water quality certificates. He discussed what needs to be examined to determine whether the agency can issue a certificate.

(continued on page 28)

The View from Our Project Sponsors, *continued*

Mr. Moore emphasized the concept of partnership in coordination of projects. He commended the Corps on overcoming obstacles to educate the public and on providing expertise in responding to emergencies. He stressed that the Corps is needed for flood control, shore protection, and dredging. Mr. Moore explained that NAD's goals have been met. The Corps is the team of choice in providing customer-focused, quality engineering services.

Ken Kendrick discussed the history of his agency and the projects on which he has worked with the Corps. He has interviewed engineers in his office to obtain opinions about the Corps. He discovered that those interviewed would like to see decentralization of project approvals, headquarters involvement in only top-level duties, increased speed, reduction of bureaucracy, and increased receptivity to Section 211 provisions.

David McKenna discussed his experience with the Port of Los Angeles project. He explained the management of the Port of Los Angeles and its authority to do work. He described the Pier 400 project. Stage two of the project is currently being completed by the Corps. He expressed the need for more funding. Mr. McKenna discussed the credit agreement between the Corps and the Port and the uniqueness of the arrangement. He expressed frustration with multi-level review. Initially he found the Corps not to be user-friendly. He praised the innovative legislation resolving the issue of relocation.

Martha Williams discussed her first exposure to a Civil Works project. She expressed her initial frustration in working with the Corps due to unfamiliarity. She discussed the difficulty of doing environmental restoration. She emphasized that the District needs to educate sponsors, especially attorneys, wherever necessary. She explained that the lengthy review process can be frustrating for sponsors.



Ms. Williams commended the Galveston District on their work on environmental restoration. She would like to see increased cooperation between the Corps and sponsors in paying for dredging and disposal.

In a question and answer session, the panel addressed questions about divisions as business centers, changes to make sponsors feel like partners, air quality certificates in New Jersey, suggestions for changes in the PCA process, input from regulators during planning stages, and shore protection provisions in WRDA '98. ♦



Project Management and Teamwork, *continued*

that the customer deserves a seat at the table and a quick answer (even if the answer is no). He suggested that one should not fixate on a particular document; rather the key is the project and how that document facilitates the project. He rhetorically asked whether the quest is for the perfect report or the perfect project and warned that we don't want to become a grant agency.

William Slezak discussed counsel as problem solvers (whereas they previously had been problem identifiers). He

voiced the perception that all of headquarters is not on the team and that the goals should be to make headquarters part of the team.

Ellen Simon discussed her role as a representative at the PRB. She also noted the role of counsel in negotiating the Feasibility Cost Sharing Agreement. She pointed out that the key is to develop relationships early in the process and to resolve issues early.

Mr. Osborne closed by re-emphasizing that we are now into business process, not stovepipe. ♦

Friday, May 22nd

The Discretionary Authority of the Chief of Engineers to Modify Authorized Projects

Scott Murphy, *Assistant Counsel for Civil Works, CECC-J*

Ron Allen, *Senior Assistant Chief Counsel for Legislation and General Law, CECC-J*

Terry Kelley, *Division Counsel, LRD*

Scott Murphy moderated a panel on the Chief's discretionary Authority. **Ron Allen**, Senior Assistant Chief Counsel for Legislation and General Law, emphasized that the scope of the Chief's discretionary authority is to be decided on a case by case basis premised on the trust between the Chief and the Congress. Mr. Allen cautioned that when that trust is breached, the Corps pays a heavy price in the court of public opinion such as occurred with the Tennessee Tombigbee case (notwithstanding the fact that the case was dismissed based on laches). He further noted that the Lock and Dam 26 reconstruction provided a "beating" from which the Corps has not completely recovered. He also mentioned the Four Mile Run project, which went from a \$7 million to \$50 million. He noted that if the Corps is authorized to do something (either explicitly or impliedly) that does not mean that changes are allowed unless they are arbitrary and capricious; first, one must find that they are authorized.

Terry Kelley, Division Counsel, for LRD, suggested that analyzing the scope of the Chief's discretionary authority should focus on the parties, on who can participate and who benefits. He discussed reallocation of water supply for Lake Enid and whether a private entity can contract for water supply storage. He noted that a recent Chief Counsel opinion found that for older projects, private entities could contract for such storage. Mr. Kelley opined that there was another



Discretionary Authority Panel: Left to right are Scott Murphy (CECC-J), Ron Allen (CECC-J) and Terry Kelley (CELRD-OC).

prong to this analysis that required that the party had to perfect its interest prior to the 1958 Water Supply Act.

Regarding a question on whether the LPP provides the sponsor with authority similar to the Chief's, Mr. Kelley noted that if they want to fund 100%, it's okay. Mr. Allen suggested that LPP is in the nature of a betterment that is still within the purview of the project authorized by Congress but to a higher or more expensive standard. ♦

AGENDA: Friday, May 22nd

- | | |
|---------------|--|
| 8:00 - 9:00 | Panel Discussion - The Discretionary Authority of the Chief of Engineers to Modify Authorized Projects |
| 9:00 - 10:00 | Reflections on a Career in Civil Works |
| 10:00 - 11:00 | Final Discussion, wrap-up, workshop evaluations |

Reflections on a Career in Civil Works

Lester Edelman, *Chief Counsel*

Lester Edelman discussed his experiences during his career with the Corps. He explained that as a change from the analytical skills required by this conference, he wished to share some feelings about his experiences with Civil Works.

Mr. Edelman emphasized that government employees must have pride in public service. Without this pride, we are unable to be flexible, to share, to lead, and to be visionaries. With pride in public service, we gain self-respect, integrity, caring, sharing, relevancy, an environmental ethic, and the ability to implement this ethic. Mr. Edelman dismissed the “know-nothings” who have attacked us over the years. He stressed that we must pass our pride in our work onto others. Our colleagues need mentoring, and money will not be the reason to stay in government work.

Mr. Edelman conveyed one overarching statement: “I am proud to be in public service.” He urged us all to say it and pass it on. He cautioned us not to shrink from discussions of public service. He explained that pride brings satisfaction.

Mr. Edelman urged everyone to view Ron Allen’s videotape on the history of the Civil Works program. He explained that we cannot know where we are going if we do not know where we have been. The history of the Civil Works program tracks the history of the United States. The key Supreme Court cases on the federal government’s authority have involved the Corps, for the cases have been about navigation, waterways, and the like. We must understand the history and legal basis so that we can build on our authorities.

Mr. Edelman discussed the relationship of trust that Congress has with the Corps. He explained that this relationship has changed as the Administration has moved in between the two entities. Although this relationship is changing, we must maintain trust with Congress. When Congress acts, we must respond and understand. Mr. Edelman explained that when we carry the burden of knowing the true meaning of laws, we must never forget the meaning as we attempt to make changes. He emphasized that we must be judicious in using our authorities.



Mr. Edelman conveyed one overarching statement: “I am proud to be in public service.”

Mr. Edelman addressed the often-heard comparison to the private sector. He explained that there is an important difference between the Corps and private industry. The private sector can act unless prohibited by law; the government can only do that which it is authorized to do.

Mr. Edelman discussed the transition taking place within the Corps. We are truly becoming a MACOM. We are commanded by military leadership more formally than in the past. This change will assist us in obtaining support from the rest of the Army. Mr. Edelman advised everyone to understand how military leadership operates and how it helps us work. He cautions that we should not be afraid that these changes will hurt the Civil Works program. Without change, we may not maintain a Civil Works program.

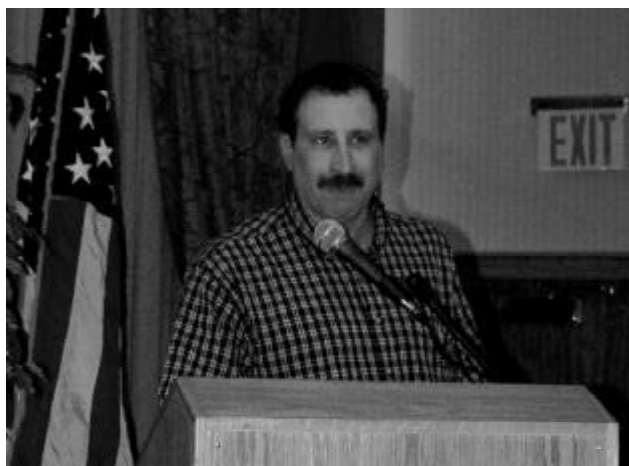
In a question and answer session, Mr. Edelman addressed questions about items that have had the greatest impact on the Corps, treatment of sponsors as partners, and advice for counsel taking on non-traditional roles. ♦

Friday, May 22nd

Final Discussion, Wrap-Up, Workshop Evaluations

Howard Goldman, *Senior Counsel for Civil Works*

Howard Goldman expressed his hope that the entire audience got a sense of why Mr. Edelman is a good friend and mentor to all. He offered detailed thanks to the Workshop Committee who organized and administrated the conference: Jan Manwiller, CECC-T; Carolyn Lynch, CECC-K; Scott Murphy, CECC-J; Sharon Totten, CECC-T; Susan Nee, CECC-J; Noelle Simpson, CECC-J; and Diane Rice, CECC-A, as well as Ellen Simon, Rita Fisher and Annette Petti of New York District, and the Marriot Hotel and its staff. He also added his thanks to those that made presentations as well as the attendees. He reiterated his goal that the conference would provide a basic understanding of the Civil Works program and process. ♦



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